PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-317–02 OF 2017
LIM YEE LAN, IDRUS HARUN JJCA AND YEOH WEE SIAM J
20 DECEMBER 2017

Civil Procedure — Declaration — Jurisdiction of court — Indonesian company sued its Indonesian director in Indonesia and filed another suit in Malaysia against the same director and several Malaysians for various causes of action — Claim against the director was that he had breached his contractual/fiduciary duties to the company for approving substantial amount of the company's funds to be paid to the Malaysian defendants without company's knowledge — Claim against Malaysian defendants was that they had, inter alia, knowingly/fraudulently received and deposited monies in Malaysian banks — All defendants in the Malaysian suit applied for declaration that Malaysian court had no jurisdiction to try the action and that it was not the proper forum to adjudicate dispute — Whether High Court was right to allow director's application and dismiss the Malaysian defendants' application — Whether the facts and causes of action against the Malaysian defendants clearly gave the Malaysian court jurisdiction — Whether Malaysian court also had jurisdiction over the director as some of the causes of action against him were for torts committed within Malaysia — Whether s 23(1)(b) of the Courts of Judicature Act 1964 gave Malaysian High Court extra-territorial jurisdiction over foreigners who were jointly sued with the Malaysian defendants in respect of causes of action which occurred in Malaysia — Whether director was necessary and proper party to the Malaysian suit so that causes of action in that suit could be completely pleaded and proven — Whether the Malaysian court was apt and natural forum to adjudicate dispute between all parties

In an action filed in the High Court in Malaysia, the appellant, an Indonesian company, sued the respondent (an Indonesian citizen and its director cum general manager) and the second to eighth defendants ('the defendants') who were related to him and residing in Malaysia, for various causes of action. The appellant had filed a separate action against the respondent in Indonesia. In both the suits, the appellant's claims against the respondent were premised on breach of contractual and fiduciary duties, fraud, breach of trust and conspiracy to defraud, for approving the payment of IDR600 billion of the appellant's monies to the defendants without the knowledge or approval of the appellant's board of directors. As against the defendants, the appellant claimed that they received the monies knowing that it was paid to them in breach of the respondent's duties to the appellant. The causes of action against the defendants were for the torts of knowing receipt, fraud, conspiracy to defraud

and constructive trust. The respondent and the defendants applied separately under the Rules of Court 2012 for a declaration that the Malaysian court had no jurisdiction to hear the appellant's suit. The respondent, in particular, contended that since he and the appellant was Indonesian and the matters which gave rise to the causes of action against him took place in Indonesia, the Malaysian court had no jurisdiction over the subject-matter of the claim or the relief/remedy sought and that it was not the proper forum to adjudicate the dispute. The respondent sought an order to stay all further proceedings and to set aside the pleadings and service of all cause papers on him. The High Court allowed the respondent's application agreeing with him both on the jurisdictional and forum non conveniens issues. The application by the defendants was dismissed as the court held that it had jurisdiction to determine the causes of action against them since they were alleged to have taken place in Malaysia and also because the High Court was the proper forum to try their case. Both parties appealed against the decision to the Court of Appeal.

Held, allowing the appellant's appeal (and setting aside the High Court's decision in that regard) and dismissing the defendants' appeal:

(1) The appellant's claims sufficiently satisfied the essential requirements of s 23(1) of the Courts of Judicature Act 1964 ('the CJA') to give the High Court in Malaysia jurisdiction to adjudicate the appellant's suit against all the defendants. It mattered not that the respondent himself might be outside the jurisdiction of the High Court. Section 23(1)(b) of the CJA merely required one of several defendants to be within jurisdiction and if that was fulfilled, the Malaysian court had jurisdiction to adjudicate the dispute as s 23(1)(b) plainly provided extra-territorial jurisdiction to the High Court in cases where foreigners were sued as co-defendants with local residents (see paras 7 & 11).

(2) The High Court erred on the facts and in law when it limited its assessment and findings to those matters relating to the fact that the respondent was an Indonesian, that the appellant's causes of action against him was for breach of his contractual and fiduciary duties as general manager and director of the appellant and that the claim against the respondent was for unlawfully approving payment of IDR600 billion to the defendants. The High Court completely ignored the other causes of action against the respondent including fraud and conspiracy to defraud which were torts committed within the jurisdiction of the Malaysian court. To establish those causes of action, the respondent was a necessary and proper party to the proceedings in Malaysia. Without him, the causes of action were incomplete. The High Court was correct in ordering the issuance and service of the concurrent writ of summons and notice of the concurrent writ of summons for service on the respondent out of jurisdiction because the appellant had satisfied the

conditions stipulated in O 11 r 1(1) of the Rules of Court 2012, in particular sub-paras (H) and (J) thereof (see paras 12–16).

(3) The appellant's causes of action against the defendants satisfied s 23(1)(c) of the CJA to give the Malaysian court jurisdiction as the allegation was that they had received monies belonging to the appellant and a large portion of those monies were deposited into bank accounts opened and maintained in Malaysia. It was a tort committed within the jurisdiction of the Malaysian court and, accordingly, the action against the defendants was properly brought. It was also important and relevant to consider that one of the reliefs sought by the appellant was a tracing order to trace the appellant's monies that were received by the defendants. Clearly, the facts and evidence on which the proceedings were based existed or were alleged to have occurred in Malaysia (see paras 8 & 15–16).

(4) The appropriate and natural forum to try the dispute between the appellant and the defendants, including the respondent, was the Malaysian court. The appellant would have to bring its witnesses and documents to Malaysia to establish its claim against the defendants and the respondent. It was relatively more difficult to compel the defendants as well as the Malaysian banks to attend the court in Indonesia to stand as witnesses. It was easier to compel production of evidence and documents here in Malaysia to show the trail of the appellant's monies and receipt of the monies by the defendants and the depositing of those monies into the Malaysian banks than if the proceedings were to be held in Indonesia. Indonesian law applied only in respect of the respondent and his contractual and implied duties owed to the appellant, but that was something the Malaysian court could also determine by applying Indonesian law. It was manifestly unjust to confine the appellant to the remedies available in Indonesia. The defendants had failed to establish that the Indonesian court was the more appropriate forum. Under the circumstances, it was apt that the Malaysian court adjudicated the dispute between the appellant and all the defendants including the respondent (see paras 24–25 & 27–28).

[Bahasa Malaysia summary

Dalam tindakan yang difailkan di Mahkamah Tinggi di Malaysia, perayu, sebuah syarikat Indonesia, telah menyaman responden (seorang warganegara Indonesia dan pengarah merangkap pengurus besar syarikat perayu) dan defendan kedua hingga kelapan ('defendan-defendan') yang mempunyai pertalian dengan responden dan menetap di Malaysia, bagi pelbagai kausa tindakan. Perayu telah memfailkan suatu tindakan berasingan terhadap responden di Indonesia. Dalam kedua-dua saman, tuntutan perayu terhadap responden adalah atas premis kemungkiran kontrak dan tanggungjawab fidusiari, fraud, pecah amanah dan konspirasi untuk memfraud, apabila

meluluskan pembayaran IDR600 bilion wang perayu kepada defendan-defendan tanpa pengetahuan dan kelulusan lembaga pengarah perayu. Berkenaan dengan defendan-defendan, perayu menyatakan bahawa mereka menerima wang tersebut dengan pengetahuan bahawa ia telah dibayar kepada mereka akibat daripada kemungkiran tanggungjawab responden kepada perayu. Kausa tindakan terhadap defendan-defendan adalah bagi tort mengetahui penerimaan, fraud, konspirasi untuk melakukan fraud dan amanah konstruktif. Responden dan defendan-defendan membuat permohonan berasingan di bawah Kaedah-Kaedah Mahkamah 2012 bagi suatu perisytiharan bahawa mahkamah Malaysia tidak mempunyai bidang kuasa untuk mendengar saman perayu. Responden, secara khususnya, menyatakan bahawa memandangkan dia dan perayu merupakan warganegara Indonesia dan perkara yang membawa kepada kausa tindakan terhadapnya dibuat di Indonesia, mahkamah Malaysia tidak mempunyai bidang kuasa terhadap hal perkara tuntutan atau relif/remedi yang dituntut dan ia bukanlah forum yang sewajarnya untuk menghakimi pertikaian itu. Responden memohon suatu perintah untuk menangguh semua prosiding lain dan untuk mengenepikan pliding dan penyerahan semua kertas kausa kepadanya. Mahkamah Tinggi membenarkan permohonan responden dan bersetuju dengan responden berhubung dengan kedua-dua isu bidang kuasa dan ketidaksesuaian forum. Permohonan oleh pihak defendan-defendan telah ditolak apabila mahkamah memutuskan bahawa ia mempunyai bidang kuasa untuk menentukan kausa tindakan yang dibuat terhadap mereka memandangkan tindakan itu dikatakan berlaku di Malaysia dan juga kerana Mahkamah Tinggi merupakan forum yang sesuai untuk membicarakan kes ini. Kedua-dua pihak merayu terhadap keputusan itu di Mahkamah Rayuan.

Diputuskan, membenarkan rayuan perayu (dan mengenepikan keputusan Mahkamah Tinggi berkenaan perkara itu) dan mengenepikan rayuan oleh defendan-defendan:

(1) Tuntutan perayu telah cukup untuk memenuhi kehendak asas di bawah s 23(1) Akta Kehakiman 1964 ('AK') untuk memberi bidang kuasa kepada Mahkamah Tinggi Malaysia untuk menghakimi saman perayu terhadap kesemua defendan. Ia bukan suatu perkara penting jika responden sendiri mungkin berada di luar bidang kuasa Mahkamah Tinggi. Seksyen 23(1)(b) AK hanya menghendaki salah seorang daripada defendan untuk berada dalam bidang kuasa mahkamah dan jika perkara itu telah dipenuhi, mahkamah Malaysia mempunyai bidang kuasa untuk menghakimi pertikaian itu memandangkan s 23(1)(b) dengan jelas memperuntukkan tentang bidang kuasa luar wilayah kepada Mahkamah Tinggi dalam kes yang melibatkan orang asing yang disaman sebagai defendan bersama dengan orang tempatan (lihat perenggan 7 & 11).

(2) Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila ia mengehadkan penilaian dan dapatannya kepada perkara yang

berhubungan dengan fakta bahawa responden merupakan seorang warganegara Indonesia, kausa tindakan perayu terhadap responden adalah atas kemungkiran kontrak dan tanggungjawab fidusiari sebagai pengurus besar dan pengarah perayu dan bahawa tuntutan terhadap responden adalah bagi kelulusan pembayaran sebanyak IDR600 bilion secara tidak sah kepada defendan-defendan. Mahkamah Tinggi telah sepenuhnya mengabaikan kausa tindakan lain terhadap responden termasuklah mengenai fraud dan konspirasi untuk melakukan fraud yang merupakan tort yang dilakukan dalam bidang kuasa mahkamah Malaysia. Bagi membuktikan kausa tindakan itu, responden merupakan pihak yang wajar dan betul kepada prosiding di Malaysia. Tanpa responden, kausa tindakan itu tidak lengkap. Mahkamah Tinggi telah bertindak dengan betul apabila memerintahkan pengeluaran dan penyerahan writ saman bersama dan notis bagi writ saman bersama bagi penyerahan kepada responden di luar bidang kuasa kerana perayu telah memenuhi syarat yang dinyatakan dalam A 11 k 1(1) Kaedah-Kaedah Mahkamah 2012, secara khususnya sub-perenggan (H) dan (J) (lihat perenggan 12–16).

(3) Kausa tindakan perayu terhadap defendan-defendan itu telah memenuhi s 23(1)(c) AK untuk memberi bidang kuasa kepada mahkamah Malaysia memandangkan tuduhannya ialah mereka telah menerima wang kepunyaan perayu dan sebahagian besar wang tersebut telah didepositkan ke dalam akaun bank yang dibuka dan diselia di Malaysia. Ia merupakan suatu tort yang dilakukan dalam bidang kuasa mahkamah Malaysia dan, oleh itu, tindakan terhadap defendan-defendan telah dibawa dengan sewajarnya. Adalah penting dan relevan untuk mempertimbangkan bahawa salah satu relif yang dituntut oleh perayu ialah suatu perintah pengesanan untuk mengesan wang perayu yang telah diterima oleh defendan-defendan. Adalah jelas bahawa fakta dan keterangan yang prosiding ini didasarkan wujud atau dikatakan telah berlaku di Malaysia (lihat perenggan 8 & 15–16).

(4) Forum yang wajar untuk membicarakan pertikaian antara perayu dan defendan, termasuklah responden, ialah mahkamah Malaysia. Perayu perlu untuk membawa saksinya dan dokumen ke Malaysia untuk membuktikan tuntutannya terhadap defendan-defendan dan responden. Secara relatifnya, adalah lebih sukar untuk menghendaki defendan-defendan dan juga bank Malaysia untuk hadir ke Indonesia untuk menjadi saksi. Adalah lebih mudah untuk menghendaki pengemukaan keterangan dan dokumen di Malaysia untuk menunjukkan jejak wang perayu dan penerimaan wang tersebut oleh defendan-defendan dan pendepositan wang tersebut ke dalam bank Malaysia berbanding jika prosiding itu diadakan di Indonesia. Undang-undang Indonesia hanya terpakai berkenaan dengan responden dan tanggungjawab kontrak dan tanggungjawab tersirat responden

terhadap perayu, namun perkara itu adalah suatu perkara yang juga boleh ditentukan oleh mahkamah Malaysia dengan mengguna pakai undang-undang Indonesia. Adalah suatu ketidakadilan yang jelas sekiranya remedi yang ada untuk perayu dihadkan kepada remedi yang ada di Indonesia sahaja. Pihak defendan telah gagal untuk membuktikan bahawa mahkamah Indonesia merupakan forum yang lebih wajar. Berdasarkan keadaan ini, adalah lebih cepat jika mahkamah Malaysia yang menghakimi pertikaian antara perayu dan kesemua defendan termasuklah responden (lihat perenggan 24–25 & 27–28).]

Notes

For cases on jurisdiction of court, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3274–3282.

Cases referred to

Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey, The Albaforth [1984] 2 Lloyd's Rep 91, CA (folld)

El Ajou v Dollar Land Holdings plc and another [1994] 2 All ER 685, CA (refd)

ISC Technology Sdn Bhd v Premium Systems Technology Pte Ltd [2007] MLJU 547; [2008] 7 CLJ 239, HC (refd)

Kenichi Hattori & Anor v Minoru Yamashita & Anor [2003] MLJU 608; [2004] 1 CLJ 491, HC (refd)

LNE Network Systems (Asia) Sdn Bhd v Loi Chew Ping & Ors [2015] MLJU 1884; [2015] 3 CLJ 663, HC (refd)

Malayan Banking Berhad v International Tin Council and another appeal [1989] 3 MLJ 286; [1989] 1 CLJ Rep 87, SC (refd)

Massey and Another v Heynes & Co and Schenker & Co [1888] 21 QBD 330, CA (refd)

Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor [2004] 2 MLJ 424, CA (refd)

Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors [2012] MLJU 583; [2012] 8 CLJ 1005, HC (folld)

Spiliada Maritime Corporation v Consulex Ltd [1987] AC 460, HL (refd)

Transtech Electronics Pte Ltd v Choe Jerry & Ors [1998] 3 SLR 272; [1998] 1 SLR (R) 1014, HC (folld)

United Malayan Banking Corpn Bhd v Soo Lean Tooi & Ors [1984] 1 MLJ 47 (refd)

Legislation referred to

Code of Civil Procedure 1908 [UK] O XI r (a)

Courts of Judicature Act 1964 s 23(1), (1)(a), (1)(b), (1)(c)

Rules of Court 2012 O 11 r 1, 1(1)(H), (1)(J), O 12 r 10, 10(1)(a), (1)(b), (1)(c), (1)(g), (2), (3), (4), (5)

Appeal from: Civil Suit No WA-22NCVC-310–05 of 2016 (High Court, Kuala Lumpur)

Daphne Koo (Rahmat Lim & Partners) for the appellant.
Yee Mei Ken (Teh Soo Jin with her) (Shearn Delamore & Co) for the respondent.

Idrus Harun JCA (delivering judgment of the court):

[1] On 27 May 2016, the appellant commenced the present action against the respondent and the second to eighth defendants in the High Court. The facts of the case appear sufficiently in the statement of claim in which it is pleaded that the appellant is a Jakarta domiciled company and the respondent who is an Indonesian citizen residing in Jakarta, is responsible for the business management, operations and running of the appellant. The second to eighth defendants who are the respondent's relatives, are Malaysian citizens residing in Malaysia. Essentially, the appellant's claim against the respondent, qua the first defendant in this action before the High Court, is with respect to the appellant's monies, approximately IDR600 billion, which were allegedly paid out by the respondent wrongfully and without authority, approval or consent of the appellant to the second to eighth defendants who were said to have received the monies knowing that it had been paid to them in breach of the respondent's duties to the appellant (unauthorised payments). It is noteworthy that the appellant has also filed a legal action in Indonesia against the respondent which action it is alleged by the respondent, is similar to the instant action in the court below. So far as it concerns the present action, we must necessarily highlight in this regard that the appellant's causes of action against the respondent are premised on breach of duties as particularised in para 20 of the statement of claim, fraud, breach of trust and conspiracy to defraud whereas the causes of action against the second to eighth defendants are predicated on torts of knowing receipt, fraud, conspiracy to defraud and constructive trust.

[2] On 10 October 2016, the respondent filed a notice of application in encl 22 pursuant to O 12 r 10(1)(a), (b), (c) and (g) and (2)–(5) of the Rules of Court 2012 seeking, inter alia, a declaration that in the circumstances of the case, the High Court has no jurisdiction over the respondent in respect of the subject matter of the claim or the relief or remedy sought in this action, an order that all further proceedings be stayed on the basis that Malaysia is not the proper forum for the dispute in this action and an order that the writ of summons dated 27 May 2016, concurrent writ of summons dated 14 July 2016, statement of claim dated 27 May 2016 as well as the service of these cause papers on the respondent be set aside. It is also worthy of mention that earlier, on 29 June 2016, the second to eighth defendants filed their application in encl 7 seeking similar reliefs from the High Court.

[3] On 20 January 2017, the learned judge allowed the respondent's application declaring that the Malaysian courts lacked jurisdiction and was not forum conveniens to try the civil suit against the respondent, but dismissed the second to eighth defendant's application holding that the Malaysian court could exercise jurisdiction and was the proper forum conveniens to try the civil suit against them. The appellant appealed against the High Court's decision. The second to eighth defendants too, filed their separate appeal to this court in Civil Appeal No W-02(IM)(NCVC)-316–02 of 2017. Both appeals came up for hearing before us on 10 August 2017. We heard this appeal first and allowed it. In view of our decision, we consequently dismissed Civil Appeal No 316.

[4] A point of importance which comes sharply into focus from this action is whether the High Court is seised with jurisdiction to hear and try the appellant's claim against the respondent as well as the second to eighth defendants. O 12 r 10 of the Rules of Court 2012 in this connection allows the respondent to dispute the jurisdiction of the Malaysian courts based on the grounds that the Malaysian courts lack jurisdiction and is not the forum conveniens to try the action. As is to be expected, the position adopted for the respondent as described in the respondent's affidavit in support and counsel's written submission is that the Malaysian courts lack jurisdiction to hear this case against the respondent the reasons being that the respondent is an Indonesian citizen, the appellant is a company incorporated in Indonesia and is governed under the laws of Indonesia, the causes of action of the appellant's claim is founded upon the respondent's purported breach of duties and trust as an employee and director of the appellant and the tort of conspiracy, if committed, the causes of action arose in Indonesia and outside the jurisdiction of the Malaysian courts, and the matters which purportedly gave rise to the causes of action took place in the office of the appellant in Jakarta, Indonesia.

[5] The law relating to the civil jurisdiction of the High Court is predicated on s 23(1) of the Courts of Judicature Act 1964 ('Act 91') which provides for circumstances under which the High Court is seised of jurisdiction. We now quote from Act 91, s 23(1) which stipulates as follows:

> 23 Civil jurisdiction — general
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> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
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> (a) *the cause of action arose*;
>
> (b) the *defendant or one of several defendants* resides or has his place of business;
>
> (c) *the facts on which the proceedings are based exist or are alleged to have occurred; or*

A (d) any land the ownership of which is disputed are situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing in the local jurisdiction of those other High Court. (Emphasis added.)

B **[6]** What the above provisions mean is precisely explained in *Kenichi Hattori & Anor v Minoru Yamashita & Anor* [2003] MLJU 608; [2004] 1 CLJ 491 where Ramly Ali J (as His Lordship then was) said:

C It is not necessary to establish jurisdiction in respect of all the sub-paras (a), (b), (c) and (d) above. It is sufficient if the plaintiffs can show that their action falls in any one of those subparagraphs.

We would, in amplification to the above clear rendition of the provisions of s 23(1) of Act 91, add that it is also necessary, in determining whether the court D has jurisdiction to adjudicate over the dispute, the court has to examine the content of the statement of claim and to test it against the provisions of s 23(1) of Act 91. Where, by so doing, the court is satisfied that prima facie the High Court has jurisdiction over the dispute in the sense that such dispute or civil proceedings falls within any one of the subparagraphs in sub-s 23(1) of Act 91, E it follows that prima facie, the court has jurisdiction. In *ISC Technology Sdn Bhd v Premium Systems Technology Pte Ltd* [2007] MLJU 547; [2008] 7 CLJ 239 the High Court propounded the above proposition which we fully endorse in our judgment in this appeal.

F **[7]** Based on the above sound proposition, it is clear to us that the Malaysian court does indeed have the jurisdiction to hear the present matter and in fact, the appellant herein satisfies more than one requirement under s 23(1) of Act 91 in particular the requirements in sub-paras (a), (b) and (c) thereof. It must be reiterated, however, that the appellant's claim needs only to fall within G any one of the subparagraphs for the Malaysian courts to be seised with jurisdiction pursuant to s 23(1) of Act 91. It is an irrefutable fact that the second to eighth defendants are Malaysian citizens and are resident within the jurisdiction of the Malaysian courts. It must be pointed out further that it matters not that the respondent himself may be outside the jurisdiction of the H High Court. In this respect, it ought to be emphasised that s 23(1)(b) of Act 91 merely requires one of the several defendants to be within the jurisdiction of the High Court and if that requirement is fulfilled, that would suffice and the Malaysian court should therefore have the jurisdiction to adjudicate over the dispute. To put it in other words, s 23(1)(b) of Act 91 plainly provides I extra-territorial jurisdiction to the High Court in cases where foreigners are sued as co-defendants with local residents. The Supreme Court in *Malayan Banking Berhad v International Tin Council and another appeal* [1989] 3 MLJ 286; [1989] 1 CLJ Rep 87 had occasion to consider the question whether s 23(1)(b) of Act 91 created another exception to the general rule on

extra-territorial jurisdiction of our court and held that s 23(1)(b) of Act 91 'provides extra-territorial jurisdiction to the High Court in cases where oversea foreigners are sued as co-defendants with local residents'.

[8] It is apparent, having scrutinised the statement of claim, that the appellant's claims against the defendants, including the respondent in this appeal, are based on breach of duties as particularised in para 20 of the appellant's statement of claim, the torts of knowing receipt, constructive trust, fraud and conspiracy to defraud. These allegations are pleaded in paras 20–24 of the appellant's statement of claim. We would necessarily add that the torts of knowing receipt, conspiracy to defraud and fraud allegedly committed by all of the defendants, including the respondent in this appeal, collectively have arisen and are within the jurisdiction of the Malaysian court. It is a pertinent point to consider that the appellant alleges that the second to eighth defendants received monies belonging to the appellant and a large portion of the monies received by them were in fact received into bank accounts opened and maintained in Malaysia. From these pleaded circumstances, it is patent that the appellant's causes of action against the defendants would have arisen within the jurisdiction of the Malaysian court when the said sums of monies were received by the second to eighth defendants in Malaysia. It follows therefore that the requirement in sub-para (c) of s 23(1) is fulfilled. In this respect, another important and indeed relevant point to consider is that one of the reliefs sought by the appellant in its action is for a tracing order of the appellant's monies received by the second to eighth defendants in the said Malaysian bank accounts, which relief if allowed, would inevitably require the appellant to obtain and collate relevant documentary evidence in Malaysia. Clearly the facts and evidence on which the proceedings are based exist or are alleged to have occurred in Malaysia. We are consequently led to one glaring conclusion that apart from para (a) of s 23(1) of Act 91, paras (b) and (c) thereof equally apply to this case.

[9] We refer in this connection to the case of *LNE Network Systems (Asia) Sdn Bhd v Loi Chew Ping & Ors* [2015] MLJU 1884; [2015] 3 CLJ 663 which specified the ingredients for the tort of knowing receipt, constructive trust, fraud and conspiracy to defraud. For the tort of knowing receipt, the court in *LNE Network Systems (Asia) Sdn Bhd* referred to the case of *El Ajou v Dollar Land Holdings plc and another* [1994] 2 All ER 685 which set out the elements of knowing receipt the plaintiff was required to show as follows:

> This is a claim to enforce a constructive trust on the basis of knowing receipt. For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; *secondly the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff*; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty. (Emphasis added.)

Based on the requisite three ingredients to prove tort of knowing receipt as postulated in *El Ajou*, we are here concerned with the second element of the said tort. On the facts of the present case, we are satisfied that the actual receipt of the monies by the second to eighth defendants would have been in Malaysia, when the monies were received into their Malaysian bank accounts and the monies in question are traceable in Malaysia as representing the assets of the appellant. For the tort of conspiracy to defraud, we agree with the argument urged for the appellant that one of the ingredients that must be established is that there was an agreement to injure the appellant between two or more persons.

[10] However, at this point of time, as neither the respondent nor the second to eighth defendants have entered any defence, an important question emanating from this position is whether the appellant, for the purpose of determining whether the High Court is seised with jurisdiction to try the instant action, is required to prove the allegations raised in their pleadings. The law, so far as it relates to this question, is that the court can assume that the requisite element has been proved and that the appellant's monies had been remitted by the respondent into the respective bank accounts of the second to eighth defendants in Malaysia. In other words, at the point of determining jurisdiction, all the allegations in the statement of claim must be presumed to be true. The decision of this court in *Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor* [2004] 2 MLJ 424 made it very clear that so far as burden of proof is concerned, it would be sufficient if the facts alleged by the plaintiff in his statement of claim are alleged to have occurred within the Malaysian court's jurisdiction to enable the court to seise itself of jurisdiction over the dispute and that at the point of determining jurisdiction, all the allegations in the statement of claim must be presumed to be true. There is no burden on the plaintiff to prove to conviction that the facts on which their action is based exist within the jurisdiction of the High Court. In *Matchplan (M) Sdn Bhd & Anor* therefore, the Court of Appeal held that the Malaysian court had jurisdiction over the respondents in England for the tort of libel that was alleged to have been committed in Malaysia.

[11] There is without question that the acts done in execution of the conspiracy not only took place in Indonesia when the monies were remitted out but also in Malaysia, when the monies were received by the second to eighth defendants. As for the tort of fraud, the same consideration stated above would equally apply. For the reasons that we have given, the upshot of our deliberations would support our conclusion that the appellant's claim has sufficiently satisfied the essential requirements of s 23(1) of Act 91 and consequently the High Court in Malaysia is indeed seised with the jurisdiction to hear and try the appellant's claims which without a doubt have been properly

brought by them. Accordingly, this case falls under s 23(1) of Act 91. The respondent's contention that the court below has no jurisdiction over him is therefore misconceived.

[12] In this regard, we are saying in this appeal that the learned judge had clearly erred on the facts of the present case and in law when His Lordship, in para 12 of the grounds of judgment, limited his assessment and findings to those matters relating to the fact that the respondent was an Indonesian, the appellant's cause of action against the respondent was for a breach of his contractual duties and his fiduciary duties as general manager and director of the appellant and the appellant's claim against the respondent is for approving the payment of IDR600 billion to various parties without the knowledge or approval of the appellant's board of directors.

[13] Based on the above assessment and findings, the learned judge went on to state His Lordship's opinion as follows:

> ... mahkamah berpendapat Defendan 1 adalah melanggar peruntukan-peruntukan Undang-Undang Syarikat Liability Terhad Indonesia dan Tataurusan Pertubuhan Plaintif. Sehubungan dengan itu, Defendan 1 adalah tertakluk kepada undang-undang Indonesia.
>
> (iv) kausa tindakan terhadap Defendan 1 adalah berlaku di Indonesia. Ini adalah kerana tindakan-tindakan Defendan 1 yang didakwa oleh Plaintif sebagai melanggar kewajipan fidusiari seperti menyediakan voucher, mengeluarkan cek, pindahan wang dan sebagainya adalah dilakukan di Pejabat Plaintif atau di sekitar Indonesia.

We need only say, on this aspect, and with deference to the learned judge, that His Lordship had completely ignored the other causes of action that had been mounted against the respondent by the appellant which included fraud and conspiracy to defraud. The essential point of course is that for these various causes of action, the respondent is in our opinion a necessary or proper party, without which the appellant's causes of action would not be complete.

[14] It is pertinent to consider at this point the argument advanced on behalf of the respondent that the basis for which the appellant has filed the leave application pursuant to O 11 r 1(1)(H) and (J) of the Rules of Court 2012 is completely unsubstantiated and that the leave application seeking the issuance and service of the concurrent writ of summons and notice of the concurrent of summons should not have been granted as the High Court lacked jurisdiction to try this action for the reasons that the cause of action took place outside the jurisdiction of the Malaysian courts. The conditions stipulated in O 11 r 1 of the Rules of Court 2012, in particular r (1)(H) and (J), as far as we have been able to discern have been satisfied by the appellant and they were entitled to file

for and obtain the court order dated 1 July 2016 allowing for the issuance of the concurrent writ of summons and notice of the concurrent writ of summons and service of the same to be effected out of jurisdiction. We have no hesitation in so deciding as under O 11 r 1 of the Rules of Court 2012, the High Court may grant an order for service of the notice of the concurrent writ of summons out of the jurisdiction, inter alia, in the following cases:

> (H) if the action begun by writ is founded on a tort committed within the jurisdiction;
>
> ...
>
> if the action begun by writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto.

[15] An important fact that we want to raise as well is that the respondent had approved the unauthorised payments without authorisation or knowledge of the Board of Directors, the Board of Commissioners or the shareholders of the appellant to various individuals and companies in Indonesia, Malaysia or Australia that were connected to the respondent, including the second to eighth defendants who resided in Malaysia. In this respect, it has been shown earlier that a large portion of the unauthorised payments were received by the second to eighth defendants in Malaysia. To this end, the appellant's action against the second to eighth defendants and the respondent could be said to have been founded upon, among other things, a tort committed within the jurisdiction of the Malaysian court, thus satisfying O 11 r 1(1)(H) of the Rules of Court 2012.

[16] The second to eighth defendants are parties within the jurisdiction of the High Court qua recipients of portions of the unauthorised payments which were approved by the respondent. The action against the second to eighth defendants are properly brought against them and they were duly served within the jurisdiction. Although the respondent is based in Jakarta, Indonesia, but he having approved the unauthorised payments to the second to eighth defendants there, we would hold without any hesitation that he is a necessary and a proper party to the present proceedings in Malaysia and accordingly, the condition stipulated in O 11 r 1(1)(J) has also been fulfilled. In any event, the High Court was correct in granting the order dated 1 July 2016 allowing the issuance and service of the concurrent writ of summons and notice of the concurrent writ of summons to be served out of the jurisdiction. The present action does fall within the categories of cases where service of a notice of a writ out of jurisdiction is permissible, with the leave of the court.

[17] It is important to bear in mind that the law as explained in *Malayan Banking Berhad* clearly shows that service is not solely the foundation of

jurisdiction of our High Court for apart from O 11 r 1, s 23(1)(b) of Act 91 provides extra territorial jurisdiction to the High Court in cases where foreigners are sued as co-defendants with local residents. There can be no doubt here that Parliament in s 23(1) of Act 91 intends to confer on the High Court extra-territorial jurisdiction in cases where more than one defendant are being sued, as is in the instant action, so long as one of the several defendants resides or has his place of business within Malaysia. Section 23(1)(b) of Act 91, according to Yusuf Abdul Rashid J in *United Malayan Banking Corpn Bhd v Soo Lean Tooi & Ors* [1984] 1 MLJ 47, which was followed by the Supreme Court in *Malayan Banking Berhad*, would not have been worded so, had the intention of the legislature been different. Should the words 'or one of several defendants' in s 23(1)(a)–(b) of Act 91 be omitted, the High Court would not have jurisdiction on a person who is one of several defendants and who does not reside within the local jurisdiction thereof even if the other defendants are residing therein.

[18] Lord Esher MR, delivering the judgment of the English Court of Appeal in *Massey and Another v Heynes & Co and Schenker & Co* [1888] 21 QBD 330, considered the true construction of O XI r (a) which has provisions equivalent to O 11 r (1)(J) of the Rules of Court 2012 and said at p 338:

> The question, whether a person out of the jurisdiction is a 'proper party' to an action against a person who has been served within the jurisdiction, must depend on this — supposing both parties had been within the jurisdiction would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction.

For the reasons which we have stated in this judgment, we are satisfied that the appellant has fulfilled the requirements under O 11 r 1 of the Rules of Court 2012 and therefore the respondent's argument that the appellant has failed to comply with these provisions is completely untenable and must be rejected.

[19] It is strenuously contended on behalf of the respondent that our High Court is not the proper forum to hear and adjudicate the appellant's claim against the defendants, including the respondent. We think, in considering this argument, it is legitimate to begin with an emphasis that once the appellant has demonstrated and established that the High Court is indeed seised with jurisdiction to hear the appellant's claim, the burden is then shifted to the respondent to show that there is a more natural and appropriate forum to hear the present dispute against the respondent and the second to eighth defendants. The law as explained by the House of Lords in the case of *Spiliada Maritime Corporation v Consulex Ltd* [1987] AC 460 ('The Spiliada') is that the defendant has to show that some other forum is more appropriate before a stay of the proceedings ought to be granted. *The Spiliada* was followed by the

A High Court in *Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors* [2012] MLJU 583; [2012] 8 CLJ 1005 which illustrates to us that once the requirement of s 23(1) of Act 91 has been met and that consequently the High Court has jurisdiction to hear the matter, the burden then shifts to the defendant to show there is a more natural and appropriate forum elsewhere to
B hear the dispute. Applying the principles laid down in *Q2 Engineering* which we are in full agreement, the relevant factors that would have direct bearing on the issue being considered are these:

(a) whether the respective forum had a real and substantial connection with
C the action;

(b) the costs of the trial;

(c) the nature of the dispute, the legal and practical issues involved, local knowledge and the availability of witnesses and their evidence and
D expenses;

(d) the place where the transaction giving rise to the litigation occurred; and

(e) ease of execution.

E **[20]** We are told by learned counsel for the respondent that the appellant has already filed a similar legal action against the respondent in Indonesia. In this respect, we must emphasise that the Indonesian law suit that was commenced by the appellant in Indonesian is for different and separate causes of action than the present suit filed herein. In the Indonesian law suit, the second to eighth
F defendants in the present action are not named as defendants. The tort of conspiracy to defraud and fraud between the defendants in the instant action collectively is also not pleaded in the legal action there. The appellant, moreover, has also pleaded in the present action that the second to eighth defendants are holding the monies received by them from the appellant's funds
G as constructive trustees, a cause of action which is not pleaded in the Indonesian law suit. The appellant's causes of action against the respondent and the second to eighth defendants are obviously different and must be distinguished.

H **[21]** The learned judge had failed to appreciate the clear difference between the present action and the law suit in Indonesia. The appellant's claims in the instant action insofar as it is against the second to eighth defendants are not only premised upon causes of action or facts founded or arising in Indonesia. It ought to be emphasised once again that the appellant's claims against the
I second to eighth defendants are for knowing receipt, fraud, conspiracy to defraud and constructive trust. Distinct from the above, the appellant's claims against the respondent in the Indonesian suit are for breach of duties as particularised in para 20 of the appellant's statement of claim, fraud, breach of trust and conspiracy to defraud. In this respect, and even if the appellant's

claims against the respondent are premised upon the respondent's obligations and duties to the appellant under Indonesian law, our High Court, for the reasons we have alluded, can and may still seise jurisdiction to hear and try the appellant's claims. Moreover, the appellant's claims against the respondent for fraud and conspiracy to defraud are interlinked and connected with the appellant's claim against the second to eighth defendants.

[22] The point of importance that we ought to consider is the fact that the torts committed by the defendants collectively have arisen and are within the jurisdiction of the High Court. May it be remembered that we have mentioned earlier in our judgment that the second to eighth defendants are all Malaysian citizens and are currently residing in Malaysia and within the jurisdiction of the High Court. The torts of conspiracy to defraud and fraud have therefore taken place in Malaysia when the second to eighth defendants conspired with the respondent to defraud the appellant the details of which have already been deliberated above and need not be repeated at this point. But suffice for us to say that by reason of the defendants' tortuous acts, the appellant's causes of action against the second to eighth defendants would have arisen within the jurisdiction of the High Court when the sums of monies in question were received by them in Malaysia. In this respect, one of the reliefs sought by the appellant is for a tracing order of their monies received by the second to eighth defendants in the said Malaysian bank accounts. The respondent is therefore a proper, necessary and required party to establish the torts and causes of action pleaded by the appellant in the present action.

[23] With these facts before this court, we would say that despite there being two civil suits or sets of proceedings, they are not entirely the same. Even assuming that these two sets of proceedings in two different jurisdictions involve the same issues and arise from the same underlying factual matrix, they do not ipso facto prevent one of the actions from continuing. Needless to say, we have to have regard to the right of a party to invoke a jurisdiction available to him by the law of a particular country. This is exactly what the appellant is doing herein and we do not think we should deprive it of that right with good ground shown. To strengthen this proposition, we rely on the case of *Transtech Electronics Pte Ltd v Choe Jerry & Ors* [1998] 3 SLR 272; [1998] 1 SLR (R) 1014 where in dismissing a stay application on the grounds of multiplicity of proceedings, the Singapore High Court judge at p 279 (SLR); p 1020 (SLR (R)) had this to say:

> Whilst the courts have accepted that is undesirable in general for there to be two sets of proceedings in two different jurisdictions involving the same parties and the same issues and arising from the same underlying factual matrix, they do not *ipso facto* prevent one of those actions from continuing. They have evolved two remedies to deal with the situation depending on whether the applicant wishes to continue with the proceedings in the local or the foreign jurisdiction. To obtain either of the

A remedies, however, the applicant must show that his case falls within the general principles that have to be satisfied before the relief can be granted. The court has always to have regard to the right of a party to invoke a jurisdiction available to him by the law of a particular country and cannot deprive such party of that right without good ground. (para 16 at p 1020.)

B

[24] Contrary to the respondent's position that Malaysia is not forum conveniens, as far as we have been able to glean from the appellant's statement of claim, their allegations against the second to eighth defendants are primarily based upon their receipt of the appellant's monies. It is without doubt that the C second to eighth defendants themselves are crucial persons who will be required to testify at trial. In this respect, it must be pointed out that the second to eighth defendants, being Malaysian citizens with residential addresses in Malaysia, their testimony during cross-examination would be crucial not only to establish the appellant's claims against the second to eighth defendants, but D also against the respondent. The Malaysian banks which are the receiving banks would also stand to be witnesses of the receipt of monies and are located in Malaysia. With these facts before us, to our minds, there is a good deal of substance in the argument put forward by counsel for the appellant that the E location of witnesses with respect to the appellant's claim against the second to eighth defendants are in fact situated in Malaysia and this factor should therefore be resolved in favour of Malaysia and not Indonesia. In this regard, it is worthy of mention that the appellant, having commenced the action in Malaysia, would have to establish its case against the defendants here, including F the respondent and would therefore be required to bring its witnesses, which would include the appellant's Board of Directors, the Board of Commissioners or the shareholders and documents to Malaysia to establish its claim against the defendants and the respondent. On the contrary, it would be difficult to compel the second to eighth defendants as well as the Malaysian banks to G attend the court in Indonesia to stand as witnesses.

[25] Moreover, the evidence and documents to show the receipt of the monies by the second to eighth defendants into the Malaysian bank accounts are also within the jurisdiction of the High Court and are more easily H compelled to be produced here than in Indonesia. In the event that the appellant succeeds in its relief for tracing, the Malaysian banks will be required to adduce documentary evidence to show the trail of the appellant's monies and this evidence would be more easily compelled to be produced here than in Indonesia. This factor therefore should lean in favour of the Malaysian courts I being the forum convenience to hear the case.

[26] The remaining point in the contention of the respondent concerns his argument that the facts and purported dispute arose in Indonesia. It would be useful to remember that the appellant's causes of action against the respondent

and the second to eighth defendants are different. It is contended for the appellant that, even if the appellant's claim against the respondent is premised upon the respondent's obligations and duties to the appellant under Indonesian law, the appellant's claims against the second to eighth defendants, and including the respondent, are for the tortuous acts committed by the defendants which have arisen within Malaysia when the second to eighth defendants were in receipt of the appellant's monies in Malaysia. The High Court therefore has jurisdiction on the basis that the alleged tort had been committed within the jurisdiction of the High Court. On the facts of the present case, we accept the above submission and in our judgment, the High Court so having jurisdiction is the most appropriate court or the natural forum to try the claim. In this respect, we rely upon the English Court of Appeal case *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey, The Albaforth* [1984] 2 Lloyd's Rep 91 at p 96 which held that:

> ... where it is held that an alleged tort has been committed within the jurisdiction of the Court, the test which has been satisfied in order to reach that the conclusion is one founded on the basis that the Court, so having jurisdiction is the most appropriate Court to try the claim, where it is manifestly just and reasonable that the defendant should answer his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a Court which has jurisdiction on that basis must also be the natural forum for the trial of action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum.

[27] It ought to be emphasised that Indonesian law applies only in respect of the respondent and his contractual and implied duties that are owed to the appellant which can also be determined by the Malaysian court applying Indonesian law. In the event, based on all the aforesaid factors, it would be manifestly unjust to confine the appellant to the remedies in Indonesia. It is thus apt under the circumstances that Malaysia is forum conveniens vis a vis the appellant's claims against the defendants including the respondent. We agree with the appellant's contention that the Indonesian court is not a more suitable or appropriate forum to adjudicate the appellant's claim as pleaded herein, contrary to the respondents' allegations. It is also necessary at this point to emphasise that the respondent and the second to eighth defendants are required to show that the alternative forum must be more clearly appropriate than the Malaysian court and if all factors or connections pointing to both jurisdictions are equal we would endorse the High Court's decision in *Q2 Engineering* to hold that the stay must be dismissed as the respondent has failed to establish that the Indonesian court is the more appropriate forum. The learned judge, with respect, had clearly erred in fact and in law when His Lordship had concluded that the witnesses and documents were in the appellant's office, in Indonesian banks and in Indonesia and therefore the forum conveniens is Indonesia. The learned judge had also erroneously found

A that the High Court had no sufficient jurisdiction because there was a duplicate claim made by the appellant against the respondent in the court of Indonesia.

[28] For the reasons that we have already indicated, we find no difficulty whatsoever in holding on the strength of the facts gleaned from the appellant's pleadings and the long established legal principles that the instant application under consideration in this appeal is wholly unmeritorious and that on the contrary this case is eminently one which we can safely say, is genuinely covered by s 23(1)(a), (b) and (c) of Act 91. Accordingly, the appropriate and natural forum to try the dispute in this case is the Malaysian court. That being the case, we allow this appeal and set aside the order of the learned judge made on 20 January 2017. We award costs of RM10,000 to the appellant, subject to payment of the allocator fee. At this point, we turn to consider Appeal No 316 wherein the appellants are the second to eighth defendants in the court below. Learned counsel for the appellants, following our decision in the present appeal, had intimated to us that they left it to us to decide on Appeal No 316, and as we have stated at the beginning of this judgment, the said appeal, for the same reasons that we have given in this appeal, is dismissed with costs of RM10,000 awarded to the respondent, subject to payment of the allocator fee.

Appellant's appeal allowed, High Court's decision set aside; defendants' appeal dismissed.

Reported by Ashok Kumar